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MICHAEL PODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW
YORK AND HARLEM RAILROAD COMPANY, THE 51ST
STREET REALTY CORPORATION, UGP PROPERTIES,
INC.,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,
Appellees.

On Appeal from the Court of Appeals
of New York

REPLY BRIEF FOR APPELLANTS

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The admittedly novel concepts of valuation and compensation devised by the court below raise truly substantial federal questions that should be reviewed by this Court. Contrary to the view urged by the City of New York ("the City"), it is not the state of the record that is presented for review, but the constitutional principles created by the court below that require owners of private property to bear the full burden of landmark preservation.

I.

**THE DECISION BELOW DOES NOT REST
ON PRINCIPLES ELUCIDATED IN ZONING CASES.**

To argue, as the City does in its Motion to Dismiss, that this case involves no more than a challenge to a land-use regulation that has been denied for insufficient evidence misconceives the actual holding of the court below. Motion 18, 25-26.¹ That court explicitly stated that “[t]his is not a zoning case.” J.S. App. 4. Indeed, it went on to say that since the burden of a landmark designation “is borne by a single owner,” this case resembles “discriminatory” zoning that is “properly condemned.” J.S. App. 5-6. It concluded, however, that such discrimination was acceptable “when landmark regulation is involved.” J.S. App. 6.

Virtually the only decision of this Court cited by the City is *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). That was a zoning case, involving a safety ordinance of general applicability that limited mining operations within the city limits of an expanding community. It is not pertinent here and was not even cited by the court below. While zoning and historic-district statutes operate in “furtherance of a general community plan,” J.S. App. 5, the designation of Grand Central Terminal as a landmark forms no part of any such general plan. The City’s effort to ignore the construction placed on the Landmarks Law by the court below

¹ The Motion to Dismiss the City of New York and the Landmarks Preservation Commission of the City of New York (hereafter, the “Landmarks Commission”) will be cited as “Motion”; the Jurisdictional Statement and its Appendix filed by the Penn Central Transportation Company and the other appellants (hereafter referred to collectively as “Penn Central”) will be cited as “J.S.” and “J.S. App.”

should not be permitted to divert attention from the novel legal principles on which that court felt impelled to rest its decision.

In addition, the City cites several decisions by lower Federal courts or State courts. Motion 21-22. Those cases uniformly involve the regulation of historic districts, regulations similar in effect and intent to zoning laws.²

As the court below recognized, J.S. App. 5, the designation of Grand Central Terminal as a landmark does not involve a historic district. It involves one building—the Terminal. Buildings next to the Terminal or down the street from it are unaffected—except as they may be benefited by the designation. Only Grand Central is frozen in its present form. The distinction between zoning and historic-district regulation on the one hand, and the designation of particular buildings as landmarks on the other is important for Due Process Clause analysis. In *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976), the court of appeals declared that the historic-district ordinance at issue there “is of general application to a well-defined geographic area.” 516 F.2d at 1061. Indeed, the Fifth Circuit explicitly stated that the purpose of the ordinance was to preserve “the ‘tout ensemble’ of the historic French Quarter.” *Id.* at 1067. There is no “tout ensemble” at issue here—there is

² The most closely analogous of all the cases cited by the City is *Benenson v. United States*, 548 F.2d 939, 212 Ct. Cl. — (1977). That case also involved historic-district legislation, but there the Court of Claims held that the government’s actions with respect to the Willard Hotel in Washington, D.C. did amount to a taking. Just compensation to the hotel’s owners was therefore required.

only one building, selected from the thousands of buildings in Manhattan. It is that building alone on which the City has imposed drastic restrictions and prohibitions.

As Penn Central has urged, J.S. 9-15, the controlling principles of the decision below are so novel and of such potentially far-reaching importance that a full review on the merits by this Court is warranted. The City's invocation of zoning and historic district decisions, which the court below regarded as inapplicable, does nothing to refute this contention.

II.

THE CITY'S EVIDENTIARY ANALYSIS IS IRRELEVANT TO WHETHER PROBABLE JURISDICTION SHOULD BE NOTED.

The City's contentions that "[t]here has been a complete failure of proof" in this case, Motion 23, are wholly beside the point. Penn Central is *not* asking for a review of findings of fact, nor would any such review be necessary to reach a decision on the merits of this case. It is undisputed that Penn Central has been precluded by the actions of the Landmarks Commission from constructing an office building over the Terminal and receiving revenues from the rental of that building. Designating the Terminal as a landmark reduced the prospective rentals (at least \$3 million annually) to zero, as complete a "taking" as is possible. It is not, therefore, the state of the evidence that is important here. Rather, it is the retreat by the court below from the principles that have heretofore governed the application of the Due Process Clause in order to facilitate landmark preservation by local governmental units, particularly those "in financial distress." *See* J.S. 12-14.

The Motion to Dismiss, not surprisingly, chooses to ignore important aspects of the court's evaluation of transferable development rights (TDR's). Motion 25-27. The court strongly criticized the TDR's as having "many defects," being "severely limited," and requiring "complex procedures . . . to obtain a transfer permit." J.S. 17. Nonetheless, it concluded that despite their deficiencies the TDR's were "fair" compensation "for the limited purposes of a landmarking statute." J.S. App. 2-3, 13-14. It thus held that if any compensation were required for the loss of Penn Central's development rights over Grand Central, it need only be "fair."

The decision of the court below is not in this or any other respect a narrow evidentiary holding. It forthrightly asserts a special rule for landmark preservation: no inquiry into just compensation is necessary; an owner is entitled to nothing, despite the value of the property rights taken, unless it can be shown that there is no prospect of earning, sometime in the future, a reasonable return on the property retained, taking into account all other property owned in the vicinity and ascribing value to highly questionable TDR's. In so holding, the court acknowledged the novelty of, and lack of authority for, its analysis and, in essence, invited review by this Court, J.S. App. 14.³

³ If this Court noted probable jurisdiction and reversed the Court of Appeals by holding that "just" rather than merely "fair" or no compensation is required here, the actual amount of the compensation could be determined on remand in the State courts in New York. This Court would have no need to engage in property valuation or financial analysis.

III.

THE CITY HAS OFFERED NO PRECEDENTS OF THIS COURT IN SUPPORT OF THE NOVEL PRINCIPLES ADOPTED BELOW.

The City has not even attempted to answer the arguments advanced in the Jurisdictional Statement as to why this Court should note probable jurisdiction. For instance, there has been no mention of the national importance of the issues presented. *See J.S. 9-11.* Further demonstrating the significance of this litigation, an informed commentator recently observed that the decision of the court below "may be the most important historic landmark preservation case yet decided." "TDR and Landmark Preservation Win Major Court Victory," 36 *Urban Land*, September, 1977, at 16.

Likewise, the City makes no attempt to justify the central reasoning of the court below that "compensation" in a landmark case may properly be limited to the value of property created exclusively by "private" efforts. *J.S. App. 2, 7.* Since many if not all of the evidentiary matters the City deems so important are ultimately controlled by the governing principle of law involved, it is critical that the proper constitutional standard be made clear. The court below has adopted a standard without precedent in this Court's decisions, or those of any other court. That the City is unwilling even to attempt a rebuttal convincingly demonstrates the novelty of the holding of the court below on this crucial question.

One of the cases cited by the City, *Benenson v. United States, supra*, provides a graphic example of how the rationale of the court below would operate if it were allowed to stand as a precedent. If the Court of Claims had had available and had applied the holding below

in *Benenson*, it would have considered the "social complex" in which the structure for which just compensation was sought (the Willard Hotel) existed. It would have noted the proximity of the White House and numerous Federal agencies and the hotel's location on Pennsylvania Avenue. Based on this analysis, it would have concluded that "society . . . has created much of the value" (*J.S. App. 7*) of the hotel, and limited compensation accordingly.

The actual approach of the Court of Claims in *Benenson v. United States, supra*, is in such stark contrast to the analysis of the court below in the present case that it strongly suggests a conflict between state and federal courts on this basic constitutional question. Following standard Due Process Clause principles, the Court of Claims in *Benenson* found a taking by the government and required just compensation. No effort was made to distinguish between "private" and "social" elements of value. The analysis applied below, on the other hand, rested the decision on just such a purported distinction—a distinction which the City in its Motion to Dismiss wholly ignores.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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